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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ROBERT HAMLEN,
4

Plaintiff,
5

v.

16 Civ. 3526 (VB)

CONFERENCE
6

7 GATEWAY ENERGY SERVICES CORPORATION,
8

Defendant.
9

10 United States Courthouse
11 White Plains, N.Y.
12 July 12, 2017

13
14 Before: THE HONORABLE JUDITH C. MCCARTHY, Magistrate Judge
15

16 APPEARANCES

17 FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP
18 Attorneys for Plaintiff
19 DOUGLAS GREGORY BLANKINSHIP
20 CHANTAL KHALIL

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22 Attorneys for Defendant
23 MICHAEL D. MATTHEWS

24 FISHKINS, LUCKS, LLP
25 Attorneys for Defendant
STEVEN MILES LUCKS

*Proceeding recorded via digital recording device.

1 THE DEPUTY CLERK: In the matter of Robert
2 Hamlen v. Gateway Energy Services Corporation.

3 Counsel, please state your appearances for the
4 record.

5 MR. BLANKINSHIP: Good afternoon, your Honor. My
6 name is Greg Blankinship, and with me today is my associate,
7 Chantal Khalil. We're with Finkelstein, Blankinship,
8 Frei-Pearson & Garber, and we represent Mr. Hamlen.

9 THE COURT: Nice to see you again, Mr. Blankinship.

10 MR. BLANKINSHIP: Thank you, your Honor. Nice to see
11 you as well.

12 THE COURT: And welcome, Ms. Khalil.

13 MR. MATTHEWS: Good afternoon, your Honor. My name's
14 Matt Matthews. I'm with the law firm of Edison, McDowell &
15 Hetherington, and with me today is Steven Lucks, my co-counsel
16 from the law firm of Fishkin & Lucks, and we represent the
17 defendant, Gateway Energy.

18 THE COURT: Good afternoon, counsel.

19 Okay. So this matter has been referred to me for
20 general pretrial by Judge Briccetti, but it also was referred
21 at a time when there were three issues. He ruled on one and
22 there's two remaining discovery-dispute issues which the
23 parties have written letters to the Court requesting a
24 premotion conference. This is that conference.

25 I've had a chance to review those letters. I've had

1 a chance to look at the law. I'm prepared to rule on it. I
2 wanted to give each of you an opportunity to just say briefly
3 anything else you want me to consider before ruling on it.

4 So, since these are -- I think it's -- I'm not quite
5 sure where it starts. Does it start with defendants? And then
6 there's a cross with plaintiffs. So, since I believe it
7 started with the defendants, I'm going to give the defendants
8 an opportunity to have brief arguments on this.

9 MR. MATTHEWS: Yes, your Honor. Thank you. And I
10 appreciate that and certainly want to be respectful of the
11 Court's time. If the Court has read everything and formed some
12 concrete thoughts on this, I certainly don't want to waste your
13 time. If there are any specific issues that you would like me
14 to address, I would be happy to do that; if not, I'll just --

15 THE COURT: Well, why don't you both -- you know, you
16 both have arguments about kind of which standard I should
17 apply, whether it's New Jersey law or whether it's the Federal
18 Rules of Civil Procedure, so if you want to speak briefly on
19 that.

20 MR. MATTHEWS: Yes, your Honor.

21 So, under Federal Rule of Evidence 501, in a
22 diversity case, the common law -- in a diversity case, the law
23 of the underlying state controls issues of privilege as well.
24 That's Federal Rule of Evidence 501. And that's relevant.

25 This is a diversity case in which New Jersey law

governs, and New Jersey has a specific statute and rule of evidence regarding trade-secret privilege. And the statute is Section 2A:84A-26, which is also memorialized in New Jersey Rule of Evidence 514. And what that rule says is the honor of a trade-secret privilege, which may be claimed by him or his agent or employee, has a privilege to refuse to disclose the secret and prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise warrant an injustice.

So I'm not sure if it's contested that New Jersey law applies to this trade-secret issue, but to the extent it does, I think Rule 501 of the Federal Rules of Evidence and Rule 514 of the New Jersey Rules of Evidence establish that New Jersey law would apply and would protect trade secrets.

So the way that New Jersey courts apply this trade-secret privilege is to look at whether the plaintiff -- or the requesting party, I should say, has demonstrated a need for these trade secrets that outweighs the harm that would result from their disclosure, and it's our contention that they have not. We're not -- and I think -- I hope it's clear from our papers we're not refusing to produce any trade secrets. The trade secrets that we are attempting to limit production of are those that are not relevant to the claims at issue in this case.

THE COURT: Well, I guess the question that

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1 plaintiffs have or their allegations are that we're dealing
2 with variable rate and fixed rate, and plaintiffs are arguing
3 you can't look at one in a vacuum; that, you know, the way
4 you -- their theory is the way you apply and determine what
5 your variable rate will be depends on the fixed rate and so
6 that, by -- and correct me if I'm misstating it because it's
7 already been a very long day -- so, because of that, you know,
8 you really can't understand the full picture if you don't
9 understand all of it.

10 MR. MATTHEWS: Well, what I would say with respect to
11 that, I would reference a couple of statements that our
12 corporate representative made. He testified that the company
13 does consider the fixed rate itself, the rate itself, when
14 setting variable rates. He also testified that the company
15 does not consider the profitability of the fixed rates in
16 setting the variable rates.

17 Now, to try to explain why that's important, what
18 we're willing to disclose here and what we have disclosed, I
19 would make a distinction between essentially the sausage and
20 the sausage making, so to speak.

21 We've allowed plaintiffs discovery on what the fixed
22 rates themselves were; the number of customers that Gateway had
23 that were on fixed rates, marketing materials related to fixed
24 rates, the customers who were charged a variable rate who had
25 also at some time been charged a fixed rate. So the issue of

the fixed rates, which is what the company says it does consider when citing prices, we're not trying to keep that under wraps.

What we are saying are the trade secrets that we are entitled to redact or instruct witnesses not to answer based on the trade-secret privilege is the sausage making, the profitability of the fixed rates, which the company doesn't consider, the cost of the fixed products and the pricing methodology behind the fixed rates themselves. Those are the trade secrets that we're trying to protect.

The other things, the existence of what the fixed rates were, how the rate itself compared to the variable rates, that's not what's at issue here, and that's all that our witness has said the company considers when setting the variable rates.

THE COURT: How is your pricing mechanism -- is your pricing mechanism -- rather than answering how, because it's going to trade secret, is your pricing mechanism different for the fixed rate and the variable rate?

MR. MATTHEWS: The strategies are somewhat different.

THE COURT: And so issues of hedging and the contracting is different depending on --

MR. MATTHEWS: Exactly, because the fixed rate -- the company, at this point in time and since 2011, has not sold any variable-rate contracts. They only sell fixed-rate products,

1 since 2011. So those fixed-rate contracts are typically a
2 year, 18 months. I think, in some instances, they can be six
3 months. In some instances, they're two years. And so, for
4 that reason --

5 THE COURT: But are we asking for historical
6 information in this or are we asking for current information in
7 the request that plaintiffs have made?

8 MR. MATTHEWS: As I understand it, both. I think
9 most of the plaintiff's requests relate back at least to 2010
10 with certain other information.

11 I don't think, with respect to the pricing
12 strategies, and correct me if I'm wrong, that you're seeking
13 information prior to 2010.

14 There are certain contract forms and marketing
15 materials that the plaintiff has requested and that have been
16 produced that predate that time period, but I think, with
17 respect to pricing, it would be 2010 to the present.

18 THE COURT: Okay. Okay.

19 So why do you need this information?

20 MR. BLANKINSHIP: Your Honor, I think you concisely
21 stated it at the beginning. One of the reasons why we think
22 the fixed-rate information, and particularly the fixed-rate
23 profit margin, is relevant is that it is a sausage-making
24 process, and it's impossible to pick out the -- well, I won't
25 get too graphic, but you can imagine -- it's impossible to

1 break that up.

2 There are other reasons, though, why discovery about
3 the fixed-rate profit margins are relevant. First is that we
4 believe that discovery will prove that the defendant makes a
5 marginal profit on its fixed-rate customers because, as
6 Mr. Matthews just explained, that's the only way in which it
7 gets current customers. That's a source of its customer base.
8 And, of course, it has to offer low fixed rates that are below
9 utility because no customer would ever switch from utility to
10 these independent energy companies if it was going to cost them
11 more money. And the reason why the defendant can make these
12 low, if at all marginal profits on fixed-rate customers is it
13 knows that it's going to profiteer the expense of the
14 variable-rate customers once they transition from a fixed rate
15 to a variable rate. So our argument is that --

16 THE COURT: And you can still transition even
17 though -- you know, they talked about having -- since 2011,
18 there's only been fixed-rate contracts. You can transition to
19 a variable rate?

20 MR. BLANKINSHIP: Absolutely, your Honor. There are
21 two sources of current variable-rate customers, those who were
22 signed up with a variable rate or a one or two-month teaser
23 rate or now with fixed rates. The way the contract functions
24 is that once your fixed rate term is over -- they're always for
25 a term of six months or twelve months -- then you're

1 automatically transitioned to the variable rate with a rate
2 that should be as is described in the terms and conditions
3 every customer gets.

4 THE COURT: Is there a ceiling on what can be
5 increased during the variable rate from what the fixed rate is
6 or just is a -- I mean from a fixed rate to a variable rate?
7 Is there a ceiling on what can happen to the variable rate?

8 MR. BLANKINSHIP: There is not, your Honor. There is
9 a small portion of the customer base that received a separate
10 product that's not at issue in this litigation. It's a price
11 protection plan. That was only in place for a short amount of
12 time, and that's not part of the class. And, unfortunately,
13 that's exactly what we see is that Gateway, rather than setting
14 prices and making a commercially reasonable profit in line with
15 its duty of good faith and fair dealing, simply increases the
16 variable rate until customers start quitting. That's what it
17 calls churn. So our argument -- one of our arguments as to why
18 fixed-rate profits are relevant is it demonstrates bad faith.

19 Now, we discussed a little bit about the extent to
20 which the pricing strategy differs from fixed and variable
21 rates, but there's a substantial overlap. For example -- and
22 Mr. Hay testified to this, the (30) (b) (6) witness. Sometimes
23 when North America Power goes out to buy natural gas for its
24 fixed rate and variable-rate customers, it does so at the same
25 time without differentiating how those buckets are going to be

1 broken up. And I think discovery will show, as it's shown in
2 the half a dozen other cases we've done against independent
3 energy comes, that the costs for the fixed rates really aren't
4 that different than the costs that Gateway incurs to provide
5 natural gas for its variable-rate customers. And so what you
6 have is more or less the same level of costs at a significantly
7 higher profit margin. That is a demonstration of bad faith.

8 THE COURT: Well, wouldn't you be able to hedge more
9 for your fixed rates and so you can contract farther out for
10 your fixed rates because you know what you're trying -- you
11 know, you're trying to lock in a certain price because you're
12 charging a certain price on that and the variable rate you have
13 no flexibility to do the short-term hedging or short-term
14 purchase and sales of it, you know, so it would be done
15 differently?

16 MR. BLANKINSHIP: It can be done differently, but, as
17 Mr. Hay testified, it's not always done differently. And the
18 reverse is also true, your Honor. If you purchase -- if you
19 have a hedging transaction where you're purchasing gas a year
20 or two out, then you have a partner in that hedging transaction
21 which is guessing where that wholesale rate is going to be in a
22 couple years. And then they do this with a number of different
23 contracts. So it stands to reason that, in a competitive
24 market, sometimes markets will change in between this contract,
25 and so sometimes they will be lower and sometimes they will be

1 higher. In the short term, there may be differences, but, in
2 the long term, those costs should more or less even out. It's
3 the nature of a competitive market. Unless, of course, Gateway
4 is so much smarter than everybody else in the market that they
5 can predict stuff and hedge in advance, which may be true.
6 That's something that we would find in discovery.

7 There's a second reason why the variable-rate profit
8 margins are relevant, and that is it goes to commercial
9 reasonability. One of the things that Judge Briccetti
10 identified in his order that plaintiff could use to prove bad
11 faith is comparing other profits to determine whether the
12 profit defendant reaps for its variable-rate customers is
13 commercially reasonable. I would suggest that a short and easy
14 way to do that, in addition to other mechanisms that we'll
15 pursue, is you look at what other products Gateway itself
16 offers and what kind of profit margin Gateway itself offers
17 those customers. And I think what we'll find is that -- and
18 again --

19 THE COURT: Those products have to be similar.

20 MR. BLANKINSHIP: Well, I would suggest they, because
21 the costs are similar -- and again, this is something we think
22 we'll discover. We're only talking about one product here.
23 It's just natural gas. Now, maybe you have fixed rate versus a
24 variable rate, but you're just getting one bill. And this is
25 what customers expect.

1 When a reasonable consumer is trying to determine
2 whether or not they're going to go with Gateway and whether or
3 not they're going to switch to another fixed rate as opposed to
4 moving to the variable rate, they're not just going to consider
5 other variable rates in the market. They're going to consider
6 the utility rate. They're going to consider the rates of other
7 ESCOs coast. And Gateway itself concedes this. Their contract
8 says that they will consider the rates other utilities
9 consider. Well, in New Jersey, natural gas isn't -- natural
10 utilities don't charge a variable rate for natural gas. They
11 charge a rate that's set years in advance. So Gateway knows
12 that, at the very least, it's going to compare its variable
13 rate to the utilities' fixed rate. And I think it stands to
14 reason that a reasonable consumer --

15 THE COURT: Why are the utilities doing it so far in
16 advance for natural gas?

17 MR. BLANKINSHIP: It's a regulatory decision that has
18 been for decades. What they do is they purchase gas on a
19 three-year rolling cycle. So they buy a third for each of the
20 three years.

21 THE COURT: Is that the same as in New York for gas?

22 MR. BLANKINSHIP: It's not. I don't believe it is.
23 I know that, in New York, electricity is a pure market price
24 because electricity utilities buy it on a spot market. I think
25 it's more or less the same for gas.

1 THE COURT: I worked in electric utility before I
2 took the bench, so that's why I know it is a spot market, it is
3 a hedging, and fixed and variable rates are different, but I
4 never -- I'm not familiar with the gas industry in either New
5 York or New Jersey.

6 MR. BLANKINSHIP: Don't hold me to it. I am
7 reasonably certain that New York natural gas is more reflective
8 of a short-term market price.

9 THE COURT: Okay.

10 MR. BLANKINSHIP: But, again, the utility price
11 should, over the long run, even in New Jersey, reflect the
12 market price because they're buying gas in the same hedging
13 strategy that defendant is allegedly using, at least to some
14 degree. And the fact that utility prices are always
15 significantly lower than Gateway's price is another indicator
16 that they're contrary to the representations they're not
17 providing a market price.

18 If I could just make a couple more points, your
19 Honor.

20 THE COURT: Yes.

21 MR. BLANKINSHIP: We've been talking about the
22 substance of the dispute, namely, whether fixed rates are
23 appropriate, but there are serious procedural issues -- or
24 procedural infirmities with the defendant's motion for a
25 protective order. Namely, it's improper to instruct a witness

1 not to answer the question in the middle of a deposition when
2 you haven't moved for a protective order. And they had our
3 deposition notice for I think two months before the deposition.
4 It's improper to instruct a witness not to answer without
5 having first moved for a protective order in the court,
6 particularly given that Judge Briccetti has a protective order
7 in place. And, candidly, I think the defendant violated Judge
8 Briccetti's protective order because it provided that if
9 there's confidential information in a deposition, it provides a
10 specific mechanism to protect that information. It does not
11 provide for an exception to the Rule 34(c)(2), which provides
12 that there shouldn't be objections absent a privilege. So
13 there's that --

14 THE COURT: Well, see, but they would argue that
15 there is a privilege because, under New Jersey law, trade
16 secret is privileged, and so they would be saying that we are
17 allowed to direct a witness not to answer privileged questions,
18 whether it be attorney/client privilege or trade-secret
19 privilege, based on New Jersey law.

20 Whether that interpretation is right, honestly, I am
21 not going to get into that here. I think I can see it being a
22 good-faith argument, as they put in their letters, and I
23 understand it, so I don't want to address that today. I can
24 see that -- I see your argument. I see their argument. And
25 since it really doesn't matter, it really is whether what's

1 going to go on in the future and what I'm going to rule on the
2 substantive side, I'm not going to address that procedural
3 violation.

4 MR. BLANKINSHIP: Okay. I understand, your Honor.

5 I would just like to briefly address the procedural
6 issues with our motion; namely, that the defendant not be
7 allowed to redact what it considers irrelevant or trade secrets
8 in documents that are indisputably otherwise relevant.

9 And the documents we're talking about so far are
10 spreadsheets. The defendant uses these pricing spreadsheets in
11 order to set its rates, and to demonstrate how
12 interconnected --

13 THE COURT: Hold on one second.

14 (Pause)

15 THE COURT: Go on.

16 MR. BLANKINSHIP: So to demonstrate the
17 inter-connectivity between the fixed rate and the variable
18 rate, that process, they only have one spreadsheet that covers
19 both fixed rate and variable-rate setting, and it's the same
20 personnel who set these rates, and they do it all in the same
21 process during the course of a month. So when defendant
22 produced these spreadsheets, they were massively redacted. All
23 that was left was narrow information relating to New Jersey
24 natural gas variable-rate customers. So we believe it's all
25 but black letter law that it's improper to redact otherwise

1 arguably irrelevant or trade-secret information.

2 And I would note, your Honor, the information they
3 redacted isn't just trade secrets. For example, they redacted
4 everything related to fixed rates, including what the actual
5 fixed-rate customers -- the fixed rates were that tens of
6 thousands of customers were actually receiving. And this gets
7 to the issue with how difficult it is for us to try to parse
8 what they redacted to figure out whether the redactions they've
9 done are appropriate or inappropriate.

10 And I think it's telling, your Honor. And we're
11 talking hundreds, if not thousands of spreadsheets. And this
12 is issue is going to come up again when we get into e-mail
13 because I think we're going to find that the fixed rate and the
14 variable-rate setting process and the process by which they buy
15 natural gas are interconnected. So these e-mails are going to
16 cover both of these topics. And that's what we've seen in all
17 the other cases that we've done.

18 So they're going to be redacting who knows how many
19 hundreds, you know, thousands and thousands of e-mails plus all
20 these spreadsheets. It's a huge expense for the defendant.
21 The only reason they would go to that trouble is because they
22 know that it's damning evidence that they're trying to keep
23 out, keep plaintiff from obtaining.

24 It also causes significant burden on us as we have to
25 try to parse through this information, figure out what the

1 documents say without having any of the relevant context. And
2 I guarantee it's going to cause burden on the Court because
3 we're going to get into fights about what was appropriately
4 redacted, what wasn't. Your Honor's going to have to look at
5 in-camera spreadsheets and try to figure out what's appropriate
6 and what's inappropriate. None of that's necessary. And,
7 candidly, I don't think it's authorized under the federal
8 rules.

9 And I guess that gets, your Honor, to the other
10 question about which law governs the procedure for protecting
11 trade secrets. We don't dispute that the question of whether
12 the particular information at issue, whether that's a trade
13 secret. That is governed by substantive New Jersey law. But
14 this is an Erie Court. The question of the procedure by which
15 those substantive protections are afforded is a question of
16 federal law, and you see that in all the cases that we cited.

17 In contrast, the two cases the defendant cited for
18 the proposition that redactions are appropriate were two.
19 Capital Health Systems. That's a New Jersey State Court
20 decision, not applying federal law. And I would note, your
21 Honor, that that case is about a substantial written report
22 that appears to have been put together with discrete sections.
23 They could be easily redacted without destroying the meaning of
24 the document. Not at all what we're dealing with here. And
25 the second case they cite is Millennial Health. That is a

1 Southern District of New York Court, but that case is about
2 text messages, not hundreds of spreadsheets and other
3 materials. And with all due respect to the Millennial Health
4 court, there's no analysis at all about propriety of
5 redactions, and I suspect that's because the parties didn't
6 bring that issue to the court. The entire decision is all
7 about whether the particular information at issue was relevant
8 or not. There was no -- it doesn't appear that there was any
9 briefing or substantive discussion about the propriety of
10 redacting otherwise relevant information. And we believe that
11 our cases are much more persuasively reasoned.

12 So I know I've gone on for quite a while. If there's
13 anything else your Honor would like me to address, I would be
14 more than happy to.

15 THE COURT: No, that's it. Thank you.

16 Mr. Lucks, anything you want to respond to that?

17 MR. MATTHEWS: Yes, your Honor. Matt Matthews. And
18 I'll try to be brief.

19 Going back to where plaintiffs started, with their
20 argument that the profit of the fixed rates is relevant, that's
21 just not supported by the complaint. And the easiest way that
22 I think I can explain that is that the complaint, the claim
23 that they brought, that survived dismissal, is good faith and
24 fair dealing claim that looks outward. It looks at what
25 customers would expect Gateway's rate, variable rate, to do by

1 comparison to the utility and other competitors' rates. What
2 they're now seeking is information that looks inward. What
3 does Gateway do with its other products? This has nothing to
4 do with the utilities' or other competitors' rates. And
5 Gateway has no information about the utility or other
6 competitors --

7 THE COURT: Doesn't it go to -- are you saying, you
8 know, why you do what you do is completely irrelevant? It's
9 just whether yours compared to everybody else's indicates any
10 issues of, you know, inflated cost? I mean, I would think how
11 you fix the rate, why you fix the variable rate as it is is
12 relevant. And that's what they're saying this is all going to
13 figure out. That is an inward look.

14 MR. MATTHEWS: Well, but not at the fixed-rate
15 product, which, your Honor, is identified as --

16 THE COURT: Well, it wouldn't be if your client
17 hadn't said that they do look at fixed rate to determine
18 variable rate. If your client says they're apples and oranges,
19 we don't look at anything, we don't care what our fixed rate
20 is, our variable rate is based on X, Y, Z and, you know, at the
21 end, we may look and say, hey, they're the same or we may look
22 and say, oh, they're dramatically different, but it wouldn't
23 change anything, but the fact that they do look at it and take
24 it into consideration, then it becomes an issue.

25 MR. MATTHEWS: It does with respect to the rate, the

1 fixed rate itself, and we're not trying to hold that back, but
2 with respect to the profits --

3 THE COURT: Yes, but you're trying to hold back
4 information that would allow them to understand the fixed rate
5 and, therefore, be able to understand how that compares to
6 variable rate.

7 MR. MATTHEWS: Again, the case is not about whether
8 our variable rate was fair in comparison to the fixed rate.
9 That's not the allegation in the complaint. The allegation in
10 the complaint --

11 THE COURT: No, but if they can say that your
12 variable rate is particularly bad because of what you do with
13 the fixed rate and that you, in fact, changed your variable
14 rate because your fixed rate is so competitive, because of what
15 you do in that, your variable rate ends up being so much
16 higher, not necessarily than the fixed rate, but than anybody
17 else's, because you're making profit on a different subset of
18 your customers, isn't that relevant?

19 MR. MATTHEWS: I don't think that the profit that the
20 company makes on variable rates is what this case is about, and
21 it would -- if it is, it --

22 THE COURT: Why? I'm not sure they're saying it's
23 just the profit. It's what's going into all of it.

24 MR. MATTHEWS: Well, what's going into all of it in
25 terms of how the company compares its variable rate to its

1 fixed rate we've produced, and we will allow them discovery on
2 that. As to the profitability of the fixed rate, the hedging
3 strategies, that --

4 THE COURT: Yes, but what if your fixed rate is not
5 profitable? What if your fixed rate, you know it's never going
6 to be profitable and you say that's okay because we can
7 supplement the lack of profitability based on the variable
8 rate?

9 MR. MATTHEWS: Sure.

10 THE COURT: That's not relevant to what plaintiff's
11 claims are?

12 MR. MATTHEWS: No. I don't think it is, and here's
13 why. I think that what this case is about is the rates and how
14 the rates compare to the market. And so what that argument
15 would do is turn the Court into profit police. So if Gateway's
16 really good at keeping its costs low and making a big margin,
17 but it's rates are still lower than the competitors and still
18 compared reasonably with the utilities, I would submit that
19 there's nothing wrong with that.

20 THE COURT: Doesn't it go to good faith and fair
21 dealing?

22 MR. MATTHEWS: No.

23 THE COURT: How does it not go to good faith?

24 MR. MATTHEWS: If our rate is still a competitive
25 rate, then we shouldn't be penalized for running the company in

1 an efficient way. That's what I would say. If we're able to
2 make a good profit -- we shouldn't be penalized for running a
3 company efficiently and making a good profit if we're still
4 offering consumers a rate --

5 THE COURT: But this is implied covenant of good
6 faith and fair dealing with your customers.

7 MR. MATTHEWS: Correct.

8 THE COURT: Your variable-rate customers.

9 MR. MATTHEWS: Yes.

10 THE COURT: Doesn't whether they have acted in good
11 faith and fair dealing with the customers -- let's say you run
12 your company so well that you could actually give your
13 variable-rate customers a discount on what the market gives,
14 but you don't because you want to make more money. You're
15 saying it doesn't really matter what you do as long as what
16 you're getting is comparable to the outside industry.

17 MR. MATTHEWS: That is the way that they have framed
18 the issue in the complaint is that consumers expect that their
19 rate from Gateway will be competitive with other ESCOs and with
20 the utility, so, yes, I would submit that --

21 THE COURT: And they're saying your rate's not.

22 MR. MATTHEWS: Correct.

23 THE COURT: Okay.

24 MR. MATTHEWS: But the issue that we're talking about
25 today is not about is the rate competitive with other ESCOs, is

1 the rate competitive with the utility. They're asking is the
2 profit on that product more or less the same as it is on a
3 product that's not at issue at all in this case, the fixed-rate
4 product. And again, our corporate representative has testified
5 that the company does not consider the profitability of the
6 fixed rates when setting the variable rates, only the fixed
7 rates themselves, which we will give in discovery.

8 THE COURT: I'm going to ask Mr. Blankinship to
9 respond to this before we go on.

10 MR. MATTHEWS: Sure. Thank you, your Honor.

11 THE COURT: So you should only be looking outward.

12 MR. BLANKINSHIP: Yes, your Honor.

13 As Judge Briccetti clearly noted in his order, we
14 have to prove bad faith. There's little that looks more inward
15 than a determination of whether a defendant is acting in bad
16 faith when they're setting -- when they're using their
17 discretion to set rates. That's literally something that we
18 couldn't -- our complaint, to the extent it focuses outward, is
19 because that information was available to the plaintiff before
20 we filed the complaint; namely, our ability to compare the
21 rates that they're charging versus the rates other people are
22 charging and also versus the wholesale costs.

23 And it's also inaccurate, your Honor, to say that all
24 we've pled is that it's a question of how their rates compare
25 to utility rates and other ESCOs rates. We also specifically

1 plead that one of the reasons why they're not acting in good
2 faith and they violate the duty of good faith and fair dealing
3 is that their rates aren't commensurate with their internal
4 costs. And so that's one of the -- and again, if it turns out
5 that the costs for the fixed rate are in line with the costs of
6 the variable rate, that goes a long way to demonstrating that
7 they don't set the variable rate in good faith and that they
8 don't set a commercially reasonable profit. And without having
9 discovery about how these two interrelated products work, we
10 would be hamstrung.

11 THE COURT: Okay.

12 Mr. Lucks, you want to say anything else? Otherwise,
13 I'm prepared to rule.

14 MR. MATTHEWS: I'll be very brief on a couple of
15 separate issues that Mr. Blankinship raised.

16 On the issue of redactions, the cases that we've
17 submitted to the Court, which Mr. Blankinship referenced, the
18 Capital Health case and the Millennial Health case show
19 instances where the courts have done just this, allowed parties
20 to redact irrelevant trade secrets from documents that are
21 otherwise relevant. The cases that the plaintiff cites in that
22 respect just go to the issue of relevance. They don't deal
23 with trade secrets themselves, which is what's at issue here
24 under the substantive New Jersey law.

25 On the issue of cost and difficulties related to the

1 redactions, I certainly submit there will be more effort on my
2 part to do some redactions, but we disagree that it's going to
3 increase the cost of discovery overall. If the plaintiff --

4 THE COURT: Oh, it could. If you over-redact, we're
5 in here every other week.

6 MR. MATTHEWS: It could. The other path is that
7 plaintiff goes into an irrelevant fishing expedition, into all
8 these other areas of our business that don't have anything to
9 do with this case.

10 Those spreadsheets also contain --

11 THE COURT: I don't think plaintiff wants the
12 irrelevant information. I think you guys differ on whether the
13 variable-rate information is relevant or not. I think they
14 would argue we only want -- if you've got something that's got
15 something to do with other than the variable rate in there,
16 they don't want -- they're not looking for that. They're
17 looking for the information relating to the variable rate.

18 So I think, you know -- I think the thing is that you
19 are defining irrelevant differently. You're defining, you
20 know, relevant as only fixed rate. They're defining relevant
21 as fixed and variable-rate information. I think that's really
22 where we have a fundamental difference.

23 MR. MATTHEWS: Well, I think --

24 THE COURT: And I think that's where I'm going to
25 have to weigh in on that in order for you to be able to proceed

1 on what, if anything, can be redacted.

2 MR. MATTHEWS: Okay. And again, I just want to be
3 very clear. To the extent that we have redacted something that
4 related to the sausage, the fixed rate itself, we'll fix that.
5 I don't know that we did. I take counsel at his word.

6 All we were trying to raise the privilege about is
7 the profitability, the pricing strategies and the cost of the
8 fixed rates themselves, because we believe that if we go down
9 that path, it's going to expand the scope of this case
10 dramatically, expand the scope of discovery dramatically into
11 areas that aren't relevant to the plaintiff as pled.

12 One other quick point on the spreadsheets. They're
13 massive documents, but they also contain information about
14 electricity in some instances, which certainly is not in issue
15 in this case. And we haven't touched on that, but I think
16 we're certainly entitled to redact that information. I mean,
17 this is solely a natural-gas case, and there has been no
18 allegation about any --

19 THE COURT: Mr. Blank, you don't have any issues
20 about that.

21 MR. BLANKINSHIP: Your Honor, we don't have any
22 immediate need for information about electricity. I don't want
23 to hamstring myself before we've even gotten into discovery.

24 THE COURT: Yes. My feeling is -- because I know
25 that was raised in the letter, and I feel like it's not an

1 issue right now because you don't believe it's relevant, you're
2 not going to produce it, and then you guys will have to meet
3 and confer. You'll have to say why you're not producing it and
4 then you'll have to meet and confer and then come to me. It
5 feels like it's there, but I can't necessarily rule on it
6 because I don't really understand it. I don't think it's
7 relevant, and I'm inclined to rule that it wouldn't go out, but
8 since I don't -- the parties haven't met and conferred on that
9 issue, I don't want to rule on that.

10 MR. MATTHEWS: Fair enough. And I just wanted to
11 raise it because there is -- in some of the spreadsheets, there
12 is information that relates to electricity, and we have
13 redacted and would continue to redact that.

14 THE COURT: I understand that. And you just have to
15 explain to Mr. Blankinship you're redacting the stuff on
16 electricity because it's not relevant, and then he can tell you
17 whether he thinks that's appropriate or not depending on what
18 the document looks like. It's hard in a vacuum for him to say
19 that's fine. As far as he's standing here, you know, he's
20 going to protect his client well, and he's not going to commit
21 that it's always going to be fine because he doesn't know what
22 the document is going to look like.

23 MR. MATTHEWS: Right.

24 THE COURT: Not to speak for you, Mr. Blankinship,
25 but I think I'm accurate there.

1 MR. BLANKINSHIP: I think you stated it very well,
2 your Honor, and I appreciate that.

3 THE COURT: Okay. Okay. I think I'm prepared to
4 rule on this. And hopefully this addresses the issues so we
5 can move on. I suspect there will be other issues as discovery
6 goes on even after I've ruled.

7 There are two related issues before the Court today
8 which can be resolved under a single analysis.

9 First, defendant seeks to move for a protective order
10 under Federal Rules of Civil Procedure 26(c), hereinafter
11 26(c), protecting the disclosure of information regarding trade
12 secrets. Docket number 38.

13 The trade secrets at issue concern defendant's
14 fixed-rate natural gas contracts. In response, plaintiff seeks
15 to compel defendant's Rule (30)(b)(6) witness to answer
16 questions regarding the relationship between defendant's fixed
17 and variable rates. Docket number 40 filed under seal; see
18 also Docket number 48.

19 Second, plaintiff seeks to move to compel the
20 production of documents that have been redacted for information
21 regarding defendant's fixed rates. Docket number 41.
22 Defendant opposes this request. Docket number 50.

23 There's currently a stipulated protective order in
24 place, which is Docket number 33.

25 Plaintiff's claim is brought under New Jersey law.

1 The parties do not dispute that the information at issue
2 constitutes trade secret and, under New Jersey law, the "owner
3 of a trade secret has a privilege." New Jersey statute
4 annotated Section 2A:84A-26; see also New Jersey Rules of
5 Evidence 514. In a diversity case such as this, Federal Rule
6 of Evidence 501 "requires the application of the state law of
7 privileges, except where the proof is directed to an issue that
8 is governed by federal law." *Lego v. Stratos Lightwave,*
9 *Incorporated*, 224 F.R.D. 576 at 578, Southern District of New
10 York 2004. Therefore, the Court applies New Jersey law to the
11 extent that the issues concern a trade-secret privilege, but
12 federal law to the discovery request made under the Federal
13 Rules of Civil Procedure. See *Hanna v. Plumer*, 380 U.S. 460 at
14 470, 1965.

15 Courts in New Jersey have recognized that "the
16 trade-secret privilege is qualified in the sense that
17 disclosure will be compelled when the information is needed to
18 try some issues in the proceeding. This is a balancing test.
19 When the need is not strong, disclosure will not be compelled.
20 Where disclosure is required, it must be balanced by a
21 protective order to prevent loss of the property interest."
22 *Capital Health Systems, Incorporated v. Horizon Healthcare*
23 *Services, Incorporated*, 140 A.3d 598, 611, New Jersey Superior
24 Court, Appellate Division, 2016, appeal granted, 158 A.3d 1184,
25 2017.

1 Likewise, under Rule 26(c), the Court must weigh the
2 relevance of the information sought against a showing of good
3 cause for the issuance of a protective order. See John Wiley &
4 Sons, Incorporated v. Book Dog Books, LLC, 298 F.R.D. 184 at
5 186, Southern District of New York, 2014. "Relevance, for
6 purposes of discovery, is an extremely broad concept" and "good
7 cause exists when a party shows that disclosure will result in
8 a clearly defined specific and serious injury." And that's
9 John Wiley & Sons. Same cite as before.

10 In terms of trade secrets, the Court may "require
11 that a trade secret not be revealed or be revealed only in a
12 specified way." Federal Rules of Civil Procedure 26(c)(1)(G).

13 Defendant urges the Court to apply the balancing test
14 as described in Capital Health Systems, 140 A.3d at 1611, to
15 resolve both issues. Docket numbers 38 and 50. Applying the
16 balancing tests described above, the Court must compare
17 plaintiff's need for the information with the potential harm
18 disclosing such information may cause defendant.

19 First, based on the arguments I heard today and on
20 plaintiff's letters, I find that information regarding fixed
21 rates may be relevant to plaintiff's claim. See Capital Health
22 Systems 140 A.3d at 609, noting that "in the context of
23 pretrial discovery proceedings in a civil case, the concept of
24 relevance is broader than under the New Jersey Rules of
25 Evidence. The test is whether the information is useful."

1 Plaintiff believes that defendant "considers the
2 costs and profits it incurs for its fixed-rate customers when
3 it sets variable rates" and that "defendant's fixed rates are
4 almost invariably lower than variable rates because it uses low
5 fixed rates to lure new customers and it can do so knowing that
6 when customers shift to the variable rate, defendant will
7 profiteer at their expense." Docket number 40, filed under
8 seal; see also Docket number 48. Plaintiff is entitled to
9 explore this theory of the the case, and the need for this
10 information is strong.

11 Second, I find that defendant would not suffer
12 serious injury from disclosing this material to the plaintiff
13 subject to the stipulated protective order that is already in
14 place. Defendant has not argued that disclosing the
15 information to plaintiff would be directly harmful. In fact,
16 defendant admits that plaintiff "is not a competitor." Docket
17 number 38. Defendant argues, instead, that "numerous similar
18 class actions have been filed against defendant's competitors,"
19 including by plaintiff's counsel in this case, and that
20 documents filed in this case are "almost certainly monitored by
21 defendant's competitors." Docket number 38. Defendant further
22 argues that the "potential inadvertent disclosure of
23 defendant's protected documents might negatively affect
24 defendant's ability to compete with other energy services
25 companies." Docket number 38.

1 Given that plaintiff is not a direct competitor and
2 that there is a stipulated protective order already in effect,
3 I find that defendant's arguments regarding theoretical harm
4 are unpersuasive. See *Allen v. City of New York*, 420 F. Supp.
5 2d, 295 at 302, Southern District of New York, 2006, which
6 says, "Case law is clear that broad allegations of harm,
7 unsubstantiated by specific examples or articulated reasoning,
8 do not satisfy the Rule 26(c) test." Furthermore, the existing
9 protective order is sufficient to protect the trade secrets.
10 *John Wiley & Sons*, 298 F.R.D. at 187 to 188; see also
11 *Fischer v. Cirrus Design Corporation*, No.
12 CIV-A-503-CV-0782 (HGM) (DEP), 2005 WL 3159658 at *7, Northern
13 District of New York, November 23rd, 2005.

14 Defendant's request to move for a protective order
15 under Federal Rules of Civil Procedure 26(c) is, therefore,
16 denied, Docket number 38, and plaintiff's request to compel
17 defendant's (30) (b) (6) witness to answer the questions about
18 the relationship between defendant's fixed and variable rates
19 is granted, Docket number 40, filed under seal; see also Docket
20 number 48. Defendants are, of course, entitled to designate
21 portions of the deposition transcript confidential pursuant to
22 the existing protective order, and the parties are under Court
23 order to treat such information as confidential. Docket number
24 33.

25 In addition, plaintiff's request to move to compel

1 defendant to produce documents that are only redacted for
2 attorney/client or work-product privilege is denied. Docket
3 number 41. However, defendant is directed not to redact
4 information regarding fixed rates from responsive documents.
5 Such documents should be produced subject to the stipulated
6 protective order. Docket number 33. See *In re Penthouse*
7 *Executive Club Comp. Litigation*, No. 10 CV 1145 KMW, 2012 WL
8 1511772 at *1, Southern District of New York, April 30th, 2012.
9 If subsequent disputes arise regarding the redaction of trade
10 secrets unrelated to variable or fixed rates for natural gas
11 contracts, the parties are directed to meaningfully meet and
12 confer before bringing those issues to the Court.

13 This is the opinion of the Court.

14 Thank you very much, Counsel.

15 MR. BLANKINSHIP: Thank you, your Honor.

16 MR. MATTHEWS: Thank you, your Honor.

17 THE COURT: What I would like to do before we leave
18 is set another conference. And that will be just a regular
19 status conference to see how everything is going. We have all
20 fact discovery not to be completed until February 12th of 2018.
21 I don't think we need to get together again until the fall,
22 sometime in October. Would everybody agree with that?

23 MR. BLANKINSHIP: Yes, your Honor. That seems
24 reasonable.

25 MR. MATTHEWS: Yes, your Honor.

1 THE COURT: Okay. So let's look at something the
2 week of October 16, something later in that week, like the 19th
3 or 20th, Ms. Hummel.

4 THE DEPUTY CLERK: We can do the 19th at 10 a.m.

5 THE COURT: The 19th at 10 a.m.

6 And let's do that in person. I want to do the next
7 conference in person. After that, we can consider going by
8 phone. Okay?

9 MR. BLANKINSHIP: Yes, your Honor.

10 THE COURT: Does that work for everybody?

11 MR. MATTHEWS: Yes, your Honor.

12 THE COURT: That conference?

13 MR. MATTHEWS: May I ask a question --

14 THE COURT: Yes.

15 MR. MATTHEWS: -- related to the Court's ruling on
16 the deposition?

17 Is the Court's order that the witness must answer
18 just the question that he's instructed not to answer or that
19 the deposition -- I guess I'm just seeking a little
20 clarification on --

21 THE COURT: The witness is going to be allowed to
22 answer the question that he was instructed not to answer. If
23 there are reasonable follow-up questions to that, then those
24 questions can also be asked because that stopped a line of
25 questioning. However, I don't see this as opening up

1 another -- you know, this isn't a second bite at the apple.
2 This is to ask the questions that he was instructed not to
3 answer and any reasonable follow-up questions.

4 Does that answer?

5 MR. MATTHEWS: Thank you, your Honor. That answers
6 it.

7 MR. BLANKINSHIP: Well, perhaps I could also seek a
8 smidge of a clarification on that, your Honor.

9 The question that the witness was instructed not to
10 answer was about the relationship between the variable rate and
11 the fixed-rate profit margins. I had some other questions
12 relating -- about how fixed rates and variable rates interact,
13 but I thought it was pretty clear that he was not going to
14 allow any of those.

15 THE COURT: No.

16 How long has this deposition gone on for?

17 MR. BLANKINSHIP: I think it only lasted for five
18 hours or so, so we still have a couple hours in the seven.

19 THE COURT: Yes. You're not going over -- whatever
20 you have left, you're not going over that. We're not sitting
21 there and the witness is not sitting there for another day, you
22 know, a full day of seven hours. It's whatever's remaining in
23 it. And it really should stick narrowly to what would be on
24 this line of questioning.

25 MR. BLANKINSHIP: Understood, your Honor. I

1 appreciate the clarification. We see no reason to go over
2 seven hours.

3 THE COURT: So, Mr. Lucks, it's going to be a little
4 bit more broad than you want it to be, because you want him to
5 just answer that question and move on, but the problem is that
6 when you object and a witness -- you know, it's not atypical
7 for a lawyer to just not sit there and ask the next ten
8 questions they might have asked if they had gone down that
9 line. So Mr. Blankinship's going to be allowed to pursue it.
10 If you think he's crossing over and abusing the privilege the
11 Court has given him, call me --

12 MR. MATTHEWS: Thank you, your Honor.

13 THE COURT: -- while the deposition is going on.
14 Okay?

15 MR. MATTHEWS: Yes, your Honor. I appreciate that.

16 THE COURT: And, Mr. Blankinship, I trust you will
17 not abuse the privilege the Court has given you.

18 MR. BLANKINSHIP: I will not, your Honor. We will
19 adhere closely to the topic.

20 THE COURT: Thank you. Have a good day.

21 MR. BLANKINSHIP: You, too.

22 MR. MATTHEWS: Thank you, your Honor.

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25